

## **REMARKS/ARGUMENTS**

This is meant to be a complete response to the non-final office action mailed on January 29, 2008. The following is a disposition of the claims: Claims 37, 45, 55, and 57 are currently amended, claims 38-44, 46-54, 56, and 58-59 are previously presented, and claim 41 is cancelled.

### **New Matter**

Applicant respectfully submits that everything added to the amended claims has support in the original disclosure, thus should not be considered new matter.

### **Claim Rejections - 35 USC § 112, First Paragraph**

In the office action dated January 29, 2008, the Examiner rejected claims 37-59 under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement.

Applicant respectfully submits that the above stated rejection of Applicant's claims 37-59 under 35 U.S.C. 112, first paragraph, is moot as it applies to the use of the term "hard" in independent claims 37, 45, 55, and 57. That is, it is respectfully submitted that due to the deletion of the term "hard" and the addition of the term "mineral" this portion of the rejection brought under 35 U.S.C. 112, first paragraph, is moot. Evidence supporting the inclusion of the term "mineral" can be found in paragraph

[0040] of the application. The Applicant explicitly teaches in paragraph [0040] that "the percentage of air voids [in the **mineral aggregate** (VMA) are] is determined using  $G_{mm}$ ." (emphasis added)

For the reasons set forth above, it is respectfully submitted that the Applicant's specification does explicitly disclose support for the addition of the term "mineral" to the independent claims 37, 45, 55, and 57.

Applicant respectfully submits that the above stated rejection of Applicant's claims 37-59 under 35 U.S.C. 112, first paragraph, is moot as it applies to the limitation "in an amount greater than about 15% by weight." That is, it is respectfully submitted that the limitation of "in an amount greater than about 15% by weight" has been amended to read "in an amount less than about 93% by weight." Thus, this portion of the rejection brought under 35 U.S.C. 112, first paragraph, is moot.

Evidence in support of this amendment can be found in paragraphs [0018] and [0052] of the Applicant's specification. The Applicant teaches the following in paragraph [0052] of their application:

"The binder is typically shipped at about 290-350°F depending on the binder type. While the binder is hot, it is mixed with aggregate including sand. The aggregate is heated to about 300-360°F before being added to the mixture. The mixture includes at least about 7% by weight binder. Preferably, it includes about 7-11% by weight binder, and most preferably, it contains about 7.5-10% by weight binder. The interlayer mixture ..."

Furthermore, the Applicant further teaches in paragraph [0018] that , "the interlayer is a mixture of binder and aggregate."

For the reasons set forth above, it is respectfully submitted that the Applicant's specification does inferentially disclose the amount of aggregate in the interlayer mixture to be in the range of less than about 93% by weight of the interlayer mixture due to the fact that the interlayer is a mixture of binder and aggregate. Therefore, if the binder is included in the interlayer in an amount of at least 7% by weight, then the aggregate would make up the balance.

In view of the above, it is respectfully requested that the Examiner withdraw the rejection of independent claims 37, 45, 55, and 57, and thus claims 38-44, 51-54, 56, and 58-59 for depending therefrom, under 35 U.S.C. 112, first paragraph, as applicable to claims now pending in the application.

**Claim Rejections - 35 USC § 112, Second Paragraph**

In the office action dated January 29, 2008, the Examiner rejected claims 37-59 under 35 U.S.C. 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Applicant respectfully submits that the above stated rejection of Applicant's claims 37-59 under 35 U.S.C. 112, second paragraph, is moot.

That is, it is respectfully submitted that due to the amendments made to independent claims 37, 45, 55, and 57, which include the language of "of the at least one asphalt mixture." The addition of the language "of the at least one asphalt mixture" included in the amended independent claims 37, 45, 55, and 57 provides a reference point from which the "by weight" measurement is taken. Thus, the metes and bounds of the independent claims 37, 45, 55, and 57 are now determinable.

In view of the above, it is respectfully requested that the Examiner withdraw the rejection of independent claims 37, 45, 55, and 57, and thus claims 38-44, 51-54, 56, and 58-59 for depending therefrom, under 35 U.S.C. 112, second paragraph, as applicable to claims now pending in the application.

### **Claim Rejections - 35 USC §103**

In the office action dated January 29, 2008, the Examiner rejected claims 37-39, 42-45, and 50-59 under 35 U.S.C. 103(a) as being unpatentable over Collins et al. (US 6,074,469) in view of Helf (US 6,248,396), and further in view of Harvey et al (Fatigue Resistance ..., Oct. 1995).

Applicant respectfully submits that the above stated rejection of Applicant's claims 37-39, 42-45, and 50-59 under 35 U.S.C. 103(a) is moot. That is, it is respectfully submitted that due to the limitation of "the

polymer-modified binder mixed under low shear blending conditions" being included in the currently amended independent claims 37, 45, 55, and 57 and the Examiner's admission that this limitation, which was previously included in claim 41, is considered allowable subject matter, the Examiner's rejection is moot and therefore no response is necessary with respect to the Examiner's rejection.

In view of the above, it is respectfully requested that the Examiner withdraw the rejection of independent claims 37, 45, 55, and 57, and thus claims 38-44, 51-54, 56, and 58-59 for depending therefrom, under 35 U.S.C. 103(a), as applicable to claims now pending in the application.

### **Claim Rejections - 35 USC §103**

In the office action dated January 29, 2008, the Examiner rejected claim 40 under 35 U.S.C. 103(a) as being unpatentable over Collins et al. in view of Helf and Harvey et al, as applied to claim 37 above, and further in view of Grubba (US 5,795,929).

Applicant respectfully submits that the above stated rejection of Applicant's claim 40 under 35 U.S.C. 103(a) is moot. That is, the inclusion of allowable subject matter, as pointed out by the Examiner and detailed above, in the independent claim 37 makes independent claim 37 allowable, and thus, claim 40 for depending therefrom.

In view of the above, it is respectfully requested that the Examiner withdraw the rejection of claim 40 under 35 U.S.C. 103(a), as applicable to claims now pending in the application.

**Claim Rejections - 35 USC §103**

In the office action dated January 29, 2008, the Examiner rejected claims 46, 47, 49, and 54 under 35 U.S.C. 103(a) as being unpatentable over Collins et al. in view of Helf and Harvey et al, as applied to the claims above, and further in view of Walter (US 3,907,582).

Applicant respectfully submits that the above stated rejection of Applicant's claims 46, 47, 49, and 54 under 35 U.S.C. 103(a) is moot. That is, the inclusion of allowable subject matter, as pointed out by the Examiner and detailed above, in the independent claim 45 makes independent claim 45 allowable, and thus, claims 46, 47, 49, and 54 for depending therefrom.

In view of the above, it is respectfully requested that the Examiner withdraw the rejection of claims 46, 47, 49, and 54 under 35 U.S.C. 103(a), as applicable to claims now pending in the application.

**Claim Rejections - 35 USC §103**

In the office action dated January 29, 2008, the Examiner rejected claim 48 under 35 U.S.C. 103(a) as being unpatentable over Collins et al. in view of Helf and Harvey et al, as applied to claim 45 above, and further in view of McDonald (US 3,907,582).

Applicant respectfully submits that the above stated rejection of Applicant's claim 48 under 35 U.S.C. 103(a) is moot. That is, the inclusion of allowable subject matter, as pointed out by the Examiner and detailed above, in the independent claim 45 makes independent claim 45 allowable, and thus, claim 48 for depending therefrom.

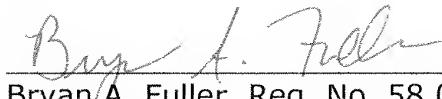
In view of the above, it is respectfully requested that the Examiner withdraw the rejection of claim 48 under 35 U.S.C. 103(a), as applicable to claims now pending in the application.

## **CONCLUSION**

It is respectfully submitted that this application, as now amended, is in condition for allowance for the reasons stated above. Therefore, it is requested that the Examiner reconsider each and every rejection as applicable to the claims pending in the application and pass such claims to an expedient issue.

The foregoing is meant to be a complete response to the Office Action mailed January 29, 2008.

In the event that any outstanding issues remain that would delay the allowance of this application, the examiner is urged to contact the undersigned to telephonically discuss such outstanding issues.

  
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